

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARY MONTES**

Claimant

VS.

**GEARY COMMUNITY HOSPITAL**

Respondent

AND

**KANSAS HEALTH CARE SERVICES**

Insurance Carrier

Docket No. 1,045,684

**ORDER**

Respondent requested review of the May 25, 2010 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on September 8, 2010.

**APPEARANCES**

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ concluded that the claimant was permanently and totally disabled as that term is defined in K.S.A. 44-510c(a)(2) as of February 2, 2009, the date she last worked for respondent. The ALJ specifically concluded that claimant "injured her back and ever

since that time her psychological condition has worsened to the extent that she is not capable of engaging in substantial gainful employment.”<sup>1</sup>

Respondent has appealed this Award contending that while claimant sustained an accidental injury, she did not establish that she sustained any permanent injury as a result of that accident. Moreover, her psychological condition which is the primary reason she is unable to return to substantial gainful employment predated her accidental injury and was not aggravated or accelerated by her injury.

Claimant maintains the ALJ's Award should be affirmed in every respect.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute surrounding the facts and circumstances of claimant's accident. Claimant was employed as a Certified Nurse's Aide and on November 7, 2008 claimant was attempting to adjust a rather large patient who was lying in bed. As she was doing so, she experienced an immediate increase of pain in her back. Claimant was treated at a local emergency room followed by physical therapy and pain medications. She has undergone no surgery and other than medications, no further treatment was offered to her. She was returned to work but was later terminated and last worked on February 2, 2009.

There is likewise no dispute that claimant suffered from extensive and ongoing bouts with psychiatric problems, including depression and bipolar disease, all of which predated her November 7, 2008 accident. Approximately 20 years ago she was diagnosed with fibromyalgia. For approximately 1 year before her accident, claimant's symptoms were controlled by medications and she was performing her work duties without any apparent disruption. She was married in July 2008 and her situation remained static until her accident.

The evidence in the record is uncontroverted that after her November 7, 2008 accident, claimant's situation began to deteriorate. In April 2009, claimant began seeing Dr. Padma Lassi, a psychiatrist with Pawnee Health Center. Claimant had already been seen at this facility by other practitioners but Dr. Lassi began seeing claimant on a regular basis following the November 2008 accident. According to Dr. Lassi, claimant is severely depressed and suffers from mood swings as a result of the pain symptoms she has been

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<sup>1</sup> ALJ Award (May 25, 2010) at 5.

experiencing since her accident.<sup>2</sup> Dr. Lassi testified that claimant's accident caused a worsening of her symptoms and there was definitely an aggravation of her condition. Claimant hears voices and has thoughts of suicide. She further testified claimant was not capable of working due to her severe depression.<sup>3</sup>

Claimant was also examined by Dr. Kathleen Keenan, a psychologist, who performed a battery of tests and interviewed claimant's husband as well as a precursor to rendering an opinion in this matter. According to Dr. Keenan, she failed to observe any pain behaviors during claimant's evaluation. She further testified that among the many tests that were performed, the MMPI-2 test revealed that claimant was "faking bad". In other words, claimant was purposefully attempting to create an inaccurate impression of her condition. She also explained that many of claimant's responses on this test were such that "she was claiming more symptoms and more severe symptoms than is reasonably logical."<sup>4</sup> Dr. Keenan added that "[t]he internal consistency scores [of the MMPI-2] showed that she did, in fact, read and respond to every item but she just exaggerated."<sup>5</sup>

After administering the MMPI-2 along with a number of other tests, Dr. Keenan concluded that claimant's psychiatric disability was caused or significantly exacerbated by the November 7, 2008 accident. She explained that -

What I'm saying is that -- let me see how to explain this. That the timing of this event in relation to what was going on in her life was such that it - she sort of enfolded it into her pathology and used it to meet her psychosocial -- she has used it to meet her psychosocial needs.<sup>6</sup>

Dr. Keenan made it clear during her deposition that claimant is not purposely or intentionally attempting to scam the system. It is simply part of her personality to co-opt events to serve her emotional and psychological purposes. Had it not been this event, it could well have been another that led to this cascade of symptoms. Dr. Keenan did, however, concede that the accident was the "straw that broke the camel's back" and allowed claimant to utilize this injury to further her psychiatric condition and thus serve her abandonment issues.<sup>7</sup>

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<sup>2</sup> Lassi Depo. at 7.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> Keenan Depo. at 15.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 24.

<sup>7</sup> *Id.* at 35.

In addition to the psychiatric component of this claim, claimant also alleges she suffered a functional impairment. Claimant's attorney had Dr. Pedro Murati examine claimant in June 2009. He diagnosed a lumbar and thoracic spine sprain along with a bipolar disorder all of which he attributed to claimant's work-related accident.<sup>8</sup> He also opined that he found no evidence of fibromyalgia during his examination although it appeared that claimant had been diagnosed with that condition many years before. He also indicated that claimant's apparent anemia and bipolar problems were preexisting. Dr. Murati imposed the following restrictions: no lifting, carrying, pushing or pulling more than 20 pounds, occasionally 20 pounds and frequently 10 pounds, avoid twisting of the trunk, occasionally bend, crouch, stoop, squat, crawl, climb stairs and ladders, frequently sit, stand, walk and drive.<sup>9</sup>

Dr. Murati assigned a 5 percent permanent partial impairment (each) to the lumbar and thoracic areas of the spine.<sup>10</sup> He also testified that claimant had lost the ability to perform 9 of the 33 unduplicated tasks outlined by Mr. Lindahl, the vocational specialist retained to itemize claimant's tasks.<sup>11</sup>

Dr. Paul Stein examined claimant in September 2009 and concluded that while claimant may have sustained an upper back strain and/or a muscle strain as a result of her injury, that injury does not account for her widespread complaints of pain which extend beyond just her back.<sup>12</sup> He concluded that she sustained no permanent impairment, no physical disability as a result of her work-related accident. Likewise, she had no task loss nor did she require any restrictions due to her injury.

The ALJ concluded the claimant was permanently and totally disabled pursuant to K.S.A. 44-510c(a)(2).<sup>13</sup> She reasoned as follows:

The issue is whether this work related accident accelerated or exacerbated [c]laimant's substantial pre-existing psychological impairment to the extent that [c]laimant is rendered permanently and totally disabled. The Court would agree with Dr. Keenan, this is a very complex and difficult case. Both psychological experts

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<sup>8</sup> Murati Depo. at 7.

<sup>9</sup> *Id.*, Ex. 2 at 4 (June 30, 2009 Release to Return to work form).

<sup>10</sup> All ratings are to the whole body and are issued pursuant to the 4th edition of The Guides (American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*) which when combined, yields 10 percent.

<sup>11</sup> Murati Depo., Ex. 3 (Doug Lindahl Task list).

<sup>12</sup> Stein Depo. at 13.

<sup>13</sup> The Award does not include any finding with respect to a functional impairment.

agree that [c]laimant is not capable of engaging in substantial and gainful employment. Dr. Lassi expressed the unequivocal opinion that the accidental injury of November 7, 2008 aggravated and exacerbated [c]laimant's psychological impairment. The evidence shows that [c]laimant was functioning satisfactorily before the accident with medication. Since the accident, [c]laimant's psychological condition has rendered [c]laimant incapable of working. Further, Dr. Keenan, while expressing the opinion that [c]laimant's injury was part of the combination that has made [c]laimant severely psychologically impaired, does not feel it is the only reason and it is only a small part. However, what is significant to the Court about her testimony is the statement that she made if it had not been the accidental injury, it would have been something else that would have aggravated the [c]laimant's psychological condition. However, it was not something else. Claimant injured her back [at work] and ever since that time her psychological condition has worsened to the extent that she is not capable of engaging in substantial gainful employment. For those reasons, the Court finds that the [c]laimant is permanently and totally disabled as of the date she last worked, February 2, 2009.<sup>14</sup>

The Board has considered the record as a whole as well as the parties' briefs and oral arguments and concludes the ALJ's Award should be affirmed.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

A preexisting mental condition is treated like any other health condition and if a work related accident aggravates, accelerates or intensifies the condition it is compensable under the Workers Compensation Act.<sup>15</sup> But a psychological injury is not compensable under Kansas law unless it is directly traceable to a work-related physical injury.<sup>16</sup>

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the

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<sup>14</sup> ALJ Award (May 25, 2010) at 5.

<sup>15</sup> *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P. 2d 469, rev. denied 265 Kan. 884 (1998).

<sup>16</sup> *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>17</sup>

In *Wardlow*<sup>18</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The Board agrees with the ALJ's analysis in this claim with respect to claimant's present inability to engage in any substantial gainful employment. Although other events might well have led to the same outcome given the framework of claimant's psychiatric condition and status, it is clear that before the injury, she was functioning without incident. She had worked for respondent without incident or apparent difficulty for approximately one year. But after her accident, she was unable to function, began hearing voices, became increasingly depressed and according to her husband, was violent towards him. Like the ALJ, the Board is persuaded that claimant is permanently and totally disabled as a direct result of her work-related injury.

Although largely irrelevant in light of the findings above, the Board nonetheless modifies the Award and finds that claimant sustained a 10 percent functional impairment as opined by Dr. Murati.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated May 25, 2010, is affirmed in part and modified in part as follows:

The claimant is entitled to 4.43 weeks of temporary total disability compensation at the rate of \$253.56 per week or \$1,123.27, followed by 41.50 weeks of permanent partial disability compensation at the rate of \$253.56 per week or \$10,522.74 for a 10 percent functional disability. As of February 2, 2009, claimant is entitled to permanent total disability compensation at a rate of \$253.56 per week for a total award not to exceed \$125,000.00.

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<sup>17</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>18</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

As of September 24, 2010 there would be due and owing to the claimant 4.43 weeks of temporary total disability compensation at the rate of \$253.56 per week in the sum of \$1,123.27, plus 41.50 weeks of permanent partial disability compensation at the rate of \$253.56 per week in the sum of \$10,522.74, followed by 85.57 weeks of permanent total disability compensation at a rate of \$253.56 in the sum of \$21,697.13, which is ordered paid in one lump sum less amounts previously paid. Thereafter the remaining balance in the amount of \$91,656.86 shall be paid at \$253.56 per week until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge